

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

JOHN E. WOLFF, JR.,	)	CASE NO. 4:11 CV 454
	)	
	)	
	)	
Petitioner,	)	JUDGE DONALD C. NUGENT
	)	
v.	)	
	)	<u>ORDER ADOPTING REPORT</u>
	)	<u>AND RECOMMENDATION</u>
TERRY TIBBLES,	)	
	)	
	)	
Respondent.	)	

This matter comes before the Court upon the Report and Recommendation of Magistrate Judge Vecchiarelli. The Report and Recommendation (ECF #40), issued on March 28, 2014, is hereby ADOPTED. Petitioner filed his amended writ of habeas corpus, pursuant to 28 U.S.C. § 2254, in July 2013 challenging the constitutionality of his conviction. Petitioner raises eleven claims in his petition. Magistrate Judge Vecchiarelli found that the petitioner's sixth and eighth claims are not cognizable on habeas review. Petitioner procedurally defaulted on grounds one through five, seven, nine, and ten. Finally, Magistrate Judge Vecchiarelli found that Petitioner's eleventh claim lacked merit. Therefore, the Magistrate Judge recommends that Petitioner's petition be denied. The Petitioner timely filed his objections to the Magistrate's Report and Recommendation. (ECF #43).

This Court has reviewed Magistrate Judge Vecchiarelli's Report and Recommendation *de novo*, considering Petitioner's objection. *See* FED. R. CIV. P. 72(b). Following a thorough evaluation of the record, this Court adopts Magistrate Judge Vecchiarelli's findings of fact and

conclusions of law as its own.

### **CERTIFICATE OF APPEALABILITY**

Pursuant to 28 U.S.C. § 2253, the Court must determine whether to grant a certificate of appealability as to any of the claims presented in the Petition. 28 U.S.C. § 2253 provides, in part, as follows:

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --

(A) the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court; or

(B) the final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

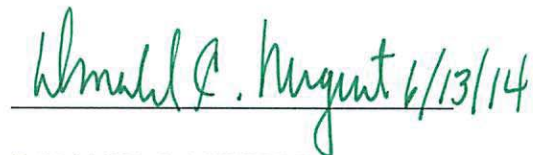
In order to make “substantial showing” of the denial of a constitutional right, as required under 28 U.S.C. § 2255(c)(2), a habeas prisoner must demonstrate “that reasonable jurists could debate whether . . . the petition should have been resolved in a different manner or that the issue presented were ‘adequate to deserve encouragement to proceed further.’” *Slack v. McDaniel*, 529 U.S. 473, 120 S. Ct. 1595, 146 L. Ed. 2d 542 (2000) (quoting *Barefoot v. Estelle*, 463 U.S. 880,

893 n.4, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983).)

Where a district court has rejected the constitutional claims on the merits, the petitioner must demonstrate only that reasonable jurists would find the district court's assessment of the constitutional claims debatable or wrong. *Slack*, 529 U.S. at 484. Where the petition has been denied on a procedural ground without reaching the underlying constitutional claims, the court must find that the petitioner has demonstrated that reasonable jurists could debate whether the petition states a valid claim of the denial of a constitutional right *and* that reasonable jurists could debate whether the district court was correct in its procedural ruling. *Id.* "Where a plain procedural bar is present and the district court is correct to invoke it to dispose of the case, a reasonable jurist could not conclude either that the district court erred in dismissing the petition or that the petitioner should be allowed to proceed further." *Id.*

Magistrate Judge Vecchiarelli's Report and Recommendation accurately addresses all of the Petitioner's claims and Petitioner's objections are unwarranted. Further, the Court certifies, pursuant to 28 U.S.C. § 1915(a)(3), that an appeal from this decision could not be taken in good faith, and there is no basis upon which to issue a certificate of appealability. 28 U.S.C. § 2253(c); FED. R. APP. P. 22(b). Petitioner's motion for habeas corpus is hereby DISMISSED WITH PREJUDICE.

IT IS SO ORDERED.

A handwritten signature in green ink, reading "Donald C. Nugent 6/13/14", is written over a horizontal line.

DONALD C. NUGENT

United States District Judge